In the Supreme Court of the United States

OCTOBER TERM 1975

No. 75-702

CONGRESS OF HISPANIC EDUCATORS, *et al.*,
Petitioners,

vs.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit of the Congress of Hispanic Educators, et al.

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The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on August 11, 1975, but stayed until September 16, 1975, when the Court of Appeals denied timely cross petitions for rehearing.

OPINIONS BELOW

The August 11, 1975 opinion of the United States Court of Appeals for the Tenth Circuit, affirming in part and revising or modifying in part, the final judgment of the United States District Court for the District of Colorado, is unreported. It is set forth in the Appendix at p. 2a[1/]. The Court of Appeals' September 16, 1975 Order denying timely cross petitions for rehearing is set forth in the Appendix at p. 1a. The opinions of the District Court, on

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1. A Joint Separate Appendix to this Petition and to the Separate Petition of the defendants, School District No. 1, et al., has been filed with this Court. References to the Joint Separate Appendix are given as Appendix at p. __.

remand from this Court, the first finding the respondents (defendants below) to have operated an illegal de jure tri-ethnic segregated school system, and the second imposing a comprehensive tri-ethnic desegregation plan, are reported at 368 F. Supp. 207 and 380 F. Supp. 673. They are also found in the Appendix at p. 270a and p. 122a respectively. The April 17, 1974, Final Judgment and Decree of the District Court is unreported. It is found in the Appendix at p. 92a.

Earlier decisions of the lower court, culminating in this Court's review and decision at 413 U.S. 189 (1973) are not included in the appendix. However, they are relevant to the questions submitted for review. The District Court's 1969 decisions granting a preliminary injunction against the defendants are reported at 303 F. Supp. 279 and 303 F. Supp. 289. The District Court's 1970 opinion and findings after a trial on the merits, that the defend-

ants had unlawfully denied equal educational opportunity to black and Chicano children in de facto segregated schools, is reported at 313 F. Supp. 61. The District Court's 1970 decision adopting a school desegregation and comprehensive education plan for Denver School District No. One is reported at 313 F. Supp. 90. The Court of Appeals' 1971 decision in part reversing the District Court on the ground that unconstitutional de jure segregation had not been proved, as to core city schools, is reported at 445 F.2d 990. The 1973 decision of this Court, reversing the decision of the Court of Appeals and ordering the case remanded to the District Court for a redetermination, according to legal standards announced by this Court in its opinion, of whether the defendants operated an unconsitutional de jure tri-ethnic segregated school system, is reported at 413 U.S. 189 (1973).[2/]

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2. Additional orders and opinions are described in a footnote to this Court's opinion. 413 U.S. at 194 n.5.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1975, in accordance with the Opinion issue on that date. That judgment was automatically stayed by the filing of timely cross petitions for rehearing which were denied by an Order of the Court of Appeals on September 16, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1)

QUESTIONS PRESENTED

1. Where the District Court correctly found Denver's public school authorities guilty of system-wide de jure segregation of their Chicano and black public school students, and further correctly found that Denver's public school authorities have otherwise discriminated against Denver's Chicano and black children by providing them with inferior programs, facilities and faculties, and generally with unequal educational opportunities which, especially as to the

Chicano public school students, results in large part from the Denver public school authorities' systematic failure to overcome language and cultural barriers, may the District Court require the Denver public school authorities to implement compensatory education programs, including bilingual-bicultural education programs, initially proposed and formulated by the Denver school authorities, within a court-ordered comprehensive desegregation plan which is designed to convert the unlawfully segregated tri-ethnic school system "to a unitary system in which racial discrimination would be eliminated root and branch"?

2. May the Court of Appeals, in reviewing the District Court's comprehensive public school desegregation plan, overrule the District Court's decision to require compensatory education, including bilingual-bicultural education, where the District Court's order is fully justified by the record and is fully consistent with the requirements, including substantial bilingual-bicultural programs, that

the Department of Health, Education and Welfare would impose on the public school authorities in desegregation compliance proceedings under Title VI of the Civil Rights Act of 1964?

3. Where the District Court's findings of fact, based upon the record made in numerous proceedings, compel the conclusion that the Denver public school system has failed to take appropriate action to overcome the language and cultural barriers that impede equal participation, particularly by its Chicano students in its instructional programs, should the District Court's order, which requires the Denver public school system to provide bilingual-bicultural education to its Chicano students, be sustained on the basis of the 1974 Equal Educational Opportunities Act, 20 U.S.C. § 1703(f) and Title VI of the Civil Rights Act of 1964, as interpreted in controlling regulations by the Department of Health, Education, and Welfare, both of which make it unlawful for a school district to

fail to take whatever steps are necessary to overcome such barriers?

4. Where the District Court, based upon findings and a record made in numerous proceedings, has concluded that Denver's public school authorities afford unequal educational opportunities to its minority group students under the Fourteenth Amendment, and that Chicano public school students suffer educational disabilities within the Denver public school system that are both similar to and different from those suffered by black public school students, may the District Court hold that this tri-ethnic discrimination violates the Fourteenth Amendment and tailor a compensatory education remedy that responds not only to the similarities but also to the differences in the harm suffered by the Chicano and black public school children of Denver?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

These materials are so voluminous that they are included in the Separate Appendix to this Petition:

UNITED STATES CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, Appendix at p. 283a.

UNITED STATES STATUTES

20 U.S.C. §§ 1701, 1703, 1706, 1708, 1712 (1974 Equal Educational Opportunities Act), Appendix at p. 284a.

42 U.S.C. § 2000d et seq. (Title VI of the Civil Rights Act of 1964), Appendix at p. 292a.

FEDERAL REGULATIONS

45 C.F.R. § 80.3(b)(1), Appendix at p. 301a.

FEDERAL REGULATIONS (cont.)

33 Fed. Reg. 4955, Appendix at p. 305a.

HEW May 25, 1970 Memorandum (35 Fed. Reg. 11595), Appendix at p. 319a.

HEW Summer 1975 Memorandum: "Evaluation of Voluntary Compliance Plans Designed to Eliminate Educational Practices Which Deny Non-English Language Dominant Students Equal Educational Opportunity." Appendix at p. 324a.

HEW - "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols, Summer 1975." Appendix at p. 330a

STATE STATUTES:

The Colorado "Bilingual and Bicultural Education Act" of 1975, Appendix at p. 362a.

STATEMENT OF THE CASE

This is a tri-ethnic public school desegregation and equal educational opportunity lawsuit against the Denver, Colorado School District, the Board of Education and its Superintendent. The case concerns the remedy to be imposed when members of a linguistic and cultural minority group are found to be the victims of proven system-wide discrimination.

The original plaintiffs are children, including some Chicanos, attending Denver public schools, who sued through their parents. Initially, they sued under 42 U.S.C. §§ 1983, 1985, 28 U.S.C. § 1343(3), (4), and the Fourteenth Amendment of the United States Constitution to enjoin the defendants from segregating minority children and faculty on the basis of race, and further from unequally allocating resources, services, facilities and plant on the basis of race.

The petitioners in this Court are the Congress of Hispanic Educators (CHE), Chicano public school students and Chicano parents of children attending Denver public schools, representing classes of Chicano teachers, students and parents. They successfully intervened as plaintiffs in the lawsuit after the District Court, on remand from this Court, found that system-wide the defendants are operating an unconsitutionally segregated and discriminatory tri-ethnic school system.[3/] They intervened to assure that the remedy plan to be adopted by the Court adequately rectified the harm caused to Chicanos by the defendants' unlawful acts; for the harm suffered by the Chicanos is similar but not identical to the harm suffered by blacks.

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3. The District Court judge in the original proceedings in this case, William E. Doyle, has continued to preside over the case, after remand, even though he has since been elevated to the United States Court of Appeals for the Tenth Circuit.

In this statement of the case, petitioners will recite only the facts and proceedings directly bearing upon the substantive questions for which they seek a writ of certiorari. The opinion of this Court, when the case was last before it, outlines more generally the fact findings and numerous proceedings to that date. 413 U.S. at 191-95.

Findings and Conclusions at the Original Trial

The original trial on the merits of this case was conducted in February 1970. See 313 F. Supp. 61. The District Court's finding that the defendants had unlawfully segregated the schools in Denver's Park Hill section was sustained by this Court as well as by the Court of Appeals. See 445 F.2d 990; 413 U.S. 189. Issue was joined in the appellate courts only over the District Court's characterization and treatment of the tri-ethnic segregation that the District Court found to pervade the public schools in other geographic areas of Denver, especially in

the core city areas. As this Court noted, in these earlier proceedings the District Court incorrectly held that the plaintiffs "had to make a fresh showing of de jure segregation in each area of the city for which they sought relief." 413 U.S. at 193. Employing this incorrect legal standard, the District Court found that, except in the Park Hill area, the defendants operate a de facto rather than a de jure segregated school system.

The District Court concluded that, by itself, de facto segregation would give rise to no constitutional violation. However, as this Court observed, the District Court found that the racially segregated core city schools, with predominantly minority group pupil populations,

> were educationally inferior to the predominantly "white" or "Anglo" schools in other parts of the district--that is, "separate facilities. . . unequal in the quality of education provided."

413 U.S. at 193, quoting 313 F. Supp. at 83. On the basis of this finding, the District Court held that the defendants

> . . . constitutionally "must at a minimum . . . offer an equal educational opportunity," 313 F. Supp., at 83, and, therefore, although all-out desegregation "could not be decreed, . . . the only feasible and constitutionally acceptable -- the only program which furnishes anything approaching substantial equality -- is a system of desegregation and integration which provides compensatory education in an integrated environment." 313 F. Supp. 90,96 (1970).

413 U.S. at 193-94. As this Court noted, "The District Court then formulated a varied remedial plan to that end which was incorporated in the Final Decree." 413 U.S. at 194.

At the original trial to determine whether the defendants had violated the plaintiffs' rights, the District Court received and evaluated considerable evidence concerning the relative quality of the educational resources and results

available at the plaintiffs' target schools, which were twenty-seven predominantly minority core city and Park Hill schools. On this evidence, the District Court found a clear "relationship between racial concentration and inferiority in achievement and low standards and consequently low morale." 313 F. Supp. at 77. Focusing more specifically on schools with "a concentration of either Negro or Hispano students in the general area of 70 to 75 percent", 313 F. Supp. at 77, the Court found that each of these fifteen schools was characterized by disproportionately "(1) low average scholastic achievement; (2) less experienced teachers; (3) higher rates of teacher turnover; (4) higher dropout rates; and (5) older buildings and smaller sites." 313 F. Supp. at 77. (For the District Court's specific findings on each of these factors, see 313 F. Supp. at 78-82. Accord: 445 F.2d at 1003.)

Indeed, after further proceedings to fashion the remedy, the District Court recited that it

> . . . found, in accordance with the overwhelming weight of the evidence, that the racial isolation of Negro and Hispano children which exists in the fifteen schools designated in this Court's opinion of March 21, 1970, together with Elyria and Smedley Elementary Schools, is the primary factor producing inequality of educational opportunity at those schools and that this inequality can be remedied only through a combined program of desegregation, together with a massive program of compensatory education. . . .

313 F. Supp. at 97. Based on the extensive record, the District Court also concluded that the only workable remedy for the defendants' constitutional violations had to mandate pupil assignment and compensatory education programs in a single interrelated and comprehensive plan, for:

> Desegregation in and of itself cannot achieve the objective of improving the quality of the education in schools. It must be

> carried out in an atmosphere of comprehensive education and preparation of teachers, pupils, parents and the community. It also must be coupled with an intense and massive compensatory education program for the students if it is to be successful.

313 F. Supp. at 97.

In its plan to provide equal educational opportunities, the District Court desegregated the Park Hill and core city schools. For non-pupil placement components of the plan, the Court relied heavily on the defendants' own proposals, which included compensatory education and bilingual-bicultural education components. 313 F. Supp. at 99.

Court of Appeals' Review of the Original Trial

The Court of Appeals affirmed the District Court's Final Judgment and Decree

> . . . in all respects except that part pertaining to the core area or court designated schools, and

> particularly the legal determination by the court that such schools were maintained in violation of the Fourteenth Amendment because of the unequal educational opportunity afforded. . . .

445 F.2d at 1007.

The Court of Appeals neither overturned nor contested the District Court's findings that educational opportunity in the court-designated schools was in fact unequal relative to the educational opportunity in Anglo schools in other parts of the district. See 445 F.2d at 1003-04. The Court of Appeals, however, rejected the District Court's legal conclusion that this Court's decision in Plessy v. Ferguson, 163 U.S. 537 (1896), renders unconstitutional proven unequal educational opportunity afforded in a racially segregated school, regardless of whether the segregation is de facto or de jure. 445 F.2d at 1004-05.

Supreme Court Review of the Original Trial

This Court, in reviewing these

earlier proceedings (413 U.S. 189), decided two points of law pertinent to the questions presented by this petition. First, the Court ruled "that the District Court erred in separating Negroes and Hispanos for purposes of defining a 'segregated' school." 413 U.S. at 197. Thus, ". . . schools with a combined predominance of Negroes and Hispanos [should be] included in the category of 'segregated' schools." 413 U.S. at 198.

Second, the Court concluded that neither the Court of Appeals nor the District Court applied the correct legal standard in determining whether the defendants had "engaged in an unconstitutional policy of deliberate segregation in the core city schools." 413 U.S. at 198. This Court, in parts II and III of its opinion, formulated the controlling standards for proving unconstitutional de jure segregation. 413 U.S. at 198-214. Under the standard set forth in part III, the District Court's earlier finding, sustained by the appellate courts, of

intentionally segregative School Board action in a meaningful portion of the Denver school system created "a prima facie case of unlawful segregative design on the part of school authorities, and shifts to these authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative action." 413 U.S. at 208.

To enable the District Court, on remand, to reconsider the contested issues according to the correct legal standards, this Court modified the judgment of the Court of Appeals "to vacate instead of reverse the parts of the Final Decree that concern the core city schools. . . ." 413 U.S. at 214.

Significantly, this Court expressly reserved its decision on the question of whether the District Court could order desegregation and compensatory education in the absence of a finding of de jure segregation. 413 U.S. at 214 n. 18.

Retrial of the De Jure Segregation Issue on Remand

On remand, the District Court conducted an additional evidentiary trial to determine whether the defendants were guilty of unconstitutional system-wide segregation. After a full hearing, augmenting and not displacing the earlier record in the case, the District Court concluded, in a Memorandum Opinion and Order dated December 11, 1973, that the Denver system is a tri-ethnic school system which is unlawfully segregated. 368 F. Supp. 207, Appendix at p. 270a.[4/]

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4. Thus the trial court determined, under part II of this Court's opinion, 413 U.S. at 198-205, that the Park Hill area and schools were not separate, independent or unrelated to the rest of the school district. The District Court, after considering the School District's evidence that its "Park Hill" actions had no effect elsewhere, rejected the evidence as "conclusory and . . . lacking in substance," and held that "Plaintiff's evidence established that racial segregation in Park Hill has substantial

Petitioners' Intervention After the District Court's Finding of System-Wide De Jure Tri-Ethnic Segregation

On January 11, 1974, the District Court granted a Motion to Intervene as Parties Plaintiffs, which had been filed on January 4, 1974, by the Congress of Hispanic Educators (CHE) and a group of Chicano parents and children suing on behalf of classes including Chicano teachers, parents and students who would be affected by the desegregation of the school district.

The Complaint in Intervention alleged deprivation of rights secured by the "Fourteenth Amendment to the Constitution and 42 U.S.C. §§ 1983, 1988,

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(footnote cont.)
effects on the schools outside the area." 368 F. Supp. at 210. The District Court stated: "The conclusion is therefore inescapable that the Denver system is a dual system within the Supreme Court's definitions." Ibid.

2000c-8 and 2000d"[5/] (Comp. ¶1.), including discrimination by the defendants in the hiring, promotion, recruitment, assignment and selection of Hispano teachers, staff members and administrators (Id. at ¶¶23, 25, and 26). Additionally, the Intervenors incorporated the allegations of unequal educational opportunity set forth in the plaintiffs' Complaint. They also specifically alleged that Chicanos constitute a separate identifiable class within the Denver school system. (Id. at ¶13.)

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5. During the pendency of this appeal, Congress enacted 88 Stat. 514, 20 U.S.C. §§ 1701 et seq. (Supp.), the 1974 Equal Educational Opportunities Act. See Appendix at pp. 284a - 91a. These provisions were brought to the attention of the Court of Appeals.

As the court's decision was being rendered, the United States Department of Health, Education, and Welfare issued new regulations implementing Title VI of the Civil Rights Act of 1964 as it bears upon educational discrimination against minorities suffering from English language

The Intervenors' prayer for relief sought, inter alia, to restrain defendants from

> (a) utilizing teaching methods, curricula, and other policies that discriminate against intervenors and their class;
>
> (b) operating the defendant district in a fashion which violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and HEW Guidelines promulgated pursuant to 42 U.S.C. § 2000d-1;

(footnote cont.)
disabilities. These regulations, which are about to be published in the Federal Register, and have been transmitted to each state's Chief State School Officer (Appendix 324a-29a), are entitled: "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols." These regulations are reproduced in the Appendix at pp. 330a-61a.

During the pendency of the appeal, the Colorado Legislature also took action relevant to the issues in this case. They enacted a comprehensive law, apparently consistent with the new

* * *

(e) denying equal educational opportunity in any other manner to Chicano students on the basis of language, culture, race, color or ethnic origin;

Id. at ¶29 (a), (b), (e).

The Remedy Trial

The District Court conducted a remedy trial from February 19, 1974, to March 4, 1974. At this trial the parties' proposed plans were introduced and evaluated, and additional evidence was received by the Court. The Intervenors participated in the remedy trial, and filed their plan, which included the Cardenas Plan, as well as more detailed specifics provided by CHE in consultation with Dr. Jose Cardenas, the plan's drafter, from its more intimate knowledge

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(footnote cont.)
HEW regulations, entitled the "Bilingual and Bicultural Education Act" of 1975. This statute is reproduced in the Appendix at pp. 362a - 416a.

of particular problems within the Denver school system.

As directed by the District Court, the defendants filed a plan, entitled, tellingly enough: "A Plan for Expanding Educational Opportunity in the Denver Public Schools." (Defendants' X-YA.) This plan was not a comprehensive desegregation plan, for it did not provide for much pupil assignment; it was more of a comprehensive equal educational opportunity plan, featuring extensive compensatory education components designed to redress the proven unequal educational opportunities received by minority students. Notably, the portion of the plan proposing "Integration of the Student Body Through New Programs", included a "Multi-Cultural Education Program" designed "to develop in students greater self-esteem, pride in cultural heritage, and positive feelings and respect for other cultures . . ." (Defendants' X-YA, § III, pp. 18, 19.)

One section of the plan was devoted exclusively to "Integration Through Curriculum, Programs, Activities, and Related Improvements." The proposals included one entitled:

Bilingual-Bicultural Education

> Through these programs, school personnel address the needs of bilingual-bicultural students to help them understand and appreciate different racial and cultural heritages. Programs are geared to help minority students find their cultural identity. The objectives of these programs are to:
>
> > provide language stimulation and experience designed to facilitate maximum growth in the use of the English language;
> >
> > foster a feeling of adequacy in each student, to help him cope with an English-speaking society;
> >
> > help each student develop self-direction, the ability to make appropriate practical decisions, and the ability to communicate effectively with others;

> maintain a pride in one's native language and culture, and share one's cultural heritage with others.
>
> Skills and competencies of teachers working with bilingual-bicultural students are developed through in-service programs.
>
> Minority History and Culture
>
> Additional new programs in minority history and culture are planned for students whose cultural heritage is different from the school culture. The objective of these programs is to bridge cultural barriers and meet language needs to make regular school offerings more productive for each student.

(Defendants' X-YA, § IV, p. 20) (Emphasis in original).

The Intervenors and the original plaintiffs cooperated in the formulation and presentation of their plans. The plaintiffs concentrated on preparation of the pupil placement components of the comprehensive desegregation plan. (E.g., Plaintiffs' X-900, 900(a) - 900(i).)

The Intervenors prepared the other equal educational opportunities components of the comprehensive desegregation plan, stressing multi-cultural, bilingual and other compensatory education approaches. (MALDEF X-1.)

The Intervenors' plan was developed by Dr. Jose Cardenas, an experienced educator familiar with the problems of Chicano and other minority children attempting to cope with an educational system directed toward middle class Anglo children. (MALDEF X-1; Tr. 979-81.)[6/]

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6. Dr. Cardenas has developed his analysis of programs to provide equal educational opportunities for minority group children in part through his past work with HEW's Office of Education. He has been used extensively in several school districts as an educational consultant for HEW in its compliance reviews. For HEW's use he has developed plans quite similar to the plan adopted by the District Court. Such plans have been successfully implemented in numerous school districts,

Dr. Cardenas found that through its system-wide tri-ethnic discrimination, the Denver school system consistently denied equal educational opportunities to minority group children. He specifically testified that these deprivations were amply reflected in statistics that show, relative to white or Anglo students: (a) a higher number and percentage of

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(footnote cont.)
including, for example, the Beeville Independent School District, Texas and the El Paso Independent School District, Texas (Tr. 1063). He was also a member of the HEW Task Force that formulated HEW's recent regulations under Title VI, entitled: "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols." Appendix at pp. 330a - 61a.

Federal district judges, in addition to Judge Doyle, have used his expertise in fashioning comprehensive desegregation plans. For example, in United States v. Texas, 342 F. Supp. 24, 28 (E.D. Tex. 1971), aff'd, 466 F.2d 518 (5th Cir. 1972), the District Court relied extensively on Dr. Cardenas in formulating a compre-

Denver's minority children assigned to special education, (b) a higher level of retention rates (failure to pass) for minority children, (c) higher drop-out rates for minority children, and (d) higher rates of under-achieving by minority children, especially in predominantly minority schools. (Tr. 984-87; 1141-43; MALDEF X-9.) Dr. Cardenas was also familiar with the District Court's prior fact findings as to the inferiority of the minority schools, viewed from the

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(footnote cont.)
hensive plan very similar to the one adopted by Judge Doyle in the instant case. Additionally, Dr. Cardenas testified as an expert in both HEW compliance proceedings and court proceedings concerning denial, by the Uvalde (Texas) Independent School District, of equal educational opportunity to Chicano students. (Tr. 1024.) See, Morales v. Shannon, 366 F. Supp. 813 (W.D. Tex. 1973), rev'd in part, aff'd in part, 516 F.2d 411 (5th Cir. 1975); Matter of Board of Education of Uvalde Independent School District, Administrative proceedings, Department of Health, Education and Welfare (Docket No. S-47, July 24, 1974). (Final Decision of Reviewing Authority.)

perspective of objective data showing, by comparison with Anglo schools, substantially lower levels of academic achievement, inexperienced faculty, higher faculty turnover, and lower academic standards. (313 F. Supp. 61 (D. Colo. 1970).) He relied upon these findings as further evidence of the defendants' systematic denial of equal educational opportunity to minority group children.

The school district had discovered several hundred Hispano children who were unable to speak or understand English, i.e., they were monolingual in Spanish; and the school district had established special programs for these children. These programs were directed toward teaching English as a second language; and as soon as this was accomplished, Spanish was dropped and the child was put into regular classes. (Defendants' X-YA, App. F; Tr. 565-73.)

Dr. Cardenas found such programs deficient for several reasons. They did not reach the many Chicano children,

estimated by CHE to number some 4,000 (MALDEF X-2), who, although perhaps able to speak English, could understand Spanish better than English. There were no bilingual programs for such children. Secondly, Chicano children enrolled in the special "English as a second language" program received no instruction in academic subjects other than in English; thus, their learning of arithmetic, social studies, science, and other academic subjects was precluded until they learned English. (Tr. 1007.) By that time the children were behind in these subjects. By contrast, Dr. Cardenas proposed a bilingual program in which the monolingual Spanish and Spanish-dominant child was also taught these other academic subjects in Spanish. (Tr. 1001-10.)

Thirdly, even for Chicano children who could speak and understand English as well as, or even better than, Spanish, as the statistical and other evidence demonstrated, the school system directly impaired their ability to secure an education on an equal basis with Anglos.

(Tr. 1006.) Dr. Cardenas maintained that the Denver school system's refusal to recognize the Chicano child's heritage and culture by offering the option of bilingual-bicultural programs to such children was extremely harmful to them. This failure of the school system denigrated the Chicano child's culture and treated it as less worthy, resulting in a lower self-image for the child which severely limited his or her educational opportunities.

Dr. Cardenas' conclusions resulted from a thorough study of the various ways in which the Denver school system's educational approach to the minority child was incompatible with minority children, and therefore denied them equal educational opportunities. Thus the system failed to recognize five attributes of minority children: culture, language, poverty, mobility and perceptions. (Tr. 991-1019.) Dr. Cardenas also discerned ten different general types of activities wherein the system failed to take these attributes into account: educational

philosophy, policies, the scope and sequence of courses, curriculum, staffing, co-curricular activities, student personnel services, non-instructional needs, community involvement and evaluation. (Tr. 1020-23.)

Dr. Cardenas stressed that it is most important to appreciate the fact that all of the racially discriminatory deficiencies of the Denver school system are interdependent and interrelated. Elimination of racial discrimination within that school system requires a comprehensive, overall approach to the tri-ethnic problems. They cannot be treated separately, if the goal of legal treatment is establishment of a unitary school system in which equal educational opportunity is available to all races and groups. (Tr. 1015; 1022.)[7/] Notably,

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7. The Addendum to the Cardenas Plan was developed by the members of CHE as a suggested application of Dr. Cardenas' principles to the particular needs in the Denver public schools. (MALDEF X-2; Tr. 1030-41.) The Addendum contains over

Dr. Cardenas also testified that such a comprehensive remedy could and should be implemented in a fully integrated setting. (Tr. 1135-39.)

Dr. Cardenas' evaluation of the needs and deficiencies resulting from the Denver school system's racial discrimination, as well as his proposals for a workable solution, were largely uncontested by the defendant's evidence. As noted by the District Court,

> Most of the opposition to the Cardenas plan generated during the evidentiary hearings went to the practicality of the plan and to problems of its implementation rather than to the educational principles espoused.

380 F. Supp. at 696, Appendix at p. 206a.

(footnote cont.)

200 detailed suggestions regarding implementation, in all of the ten general areas of activity identified by Dr. Cardenas.

The Cardenas Plan was extensively discussed by witnesses for the defendants as well as those testifying on behalf of the Congress of Hispanic Educators. Each witness supported in principle the objectives of the Cardenas Plan and the Addendum. For example, although the Superintendent of Schools, Dr. Louis Kishkunas, did express some reservations, he testified that:

> I found as I read the plan that most of the conclusions that Dr. Cardenas came to replicated or duplicated the conclusions that I came to a long time ago. . . I am sure that many of the conclusions he came to, many of the facts that he states are applicable to the Denver situation.

(Tr. 197.) Dr. David Roscoe Davidson, Assistant Superintendant of the Educational Division, also supported the Cardenas Plan and the Addendum in his testimony. (Tr. 2273-74.)

The testimony in support of the Cardenas Plan demonstrated without contradiction that similar compensatory educa-

tion and bilingual-bicultural programs have operated with marked success in redressing unequal educational opportunities, especially in a desegregation context, in other varied school districts throughout the country. (Tr. 1023-29; 1035-36; 1060-64; 1077-78; 1163-1217.) Moreover, the bilingual-bicultural components of the Cardenas Plan were, for the most part, consistent with a program already operated by the defendants at the Del Pueblo Elementary School. (Tr. 1150-62.)

The District Court's Decision on The Remedy

After the remedy trial, the District Court prepared an extensive Memorandum Opinion and Order evaluating the various plans before it and articulating the plan it adopted. 380 F. Supp. 673-726, Appendix at pp. 122a-269a (April 8, 1974). The court clearly stated that the plan it intended to fashion was designed to remedy the violations it had found on all of the evidence in the case and at each

proceeding:

> The educational opportunity in the minority schools has been proven in our present trial as well as in previous trials to be inferior to that in the majority schools.

380 F. Supp. at 682, Appendix at p. 156a.

Finding the original parties' plans to be inadequate, 380 F. Supp. at 682-83, Appendix at pp. 155a-58a, the court formulated its own comprehensive plan. For the pupil placement elements, it relied on proposals prepared by Dr. John A. Finger, a court appointed expert, 380 F. Supp. at 688-94, Appendix at pp. 178a-98a, and for bilingual-bicultural and other compensatory education components, it relied on the Intervenors' plan, 380 F. Supp. at 680-81, 692, 694-96, 697; Appendix at pp. 153a-55a, 189a-91a, 199a-207a, 210a.

In adopting the Cardenas Plan, the District Court observed that it was

> . . . mindful that meaningful desegregation must be accompanied by some appropriate alterations of existing educational programs in order to adequately deal with new problems which will arise in the operation of desegregated rather than segregated schools.
>
> The type of educational program proposed by Dr. Cardenas is particularly appropriate for the Denver school system because of the city's and region's long tradition of Mexican and Chicano influences. Additionally, Colorado law specifically encourages the use of bilingual and multicultural programs such as those proposed by the Cardenas plan to effect an enriching and nondisruptive transition of minority children from their dominant language to the effective use of English.

380 F. Supp. at 695-96; Appendix at pp. 203a-05a.

Finding that the Del Pueblo Elementary School was already operating a bilingual-bicultural program on a model or pilot basis that was very consistent with the Cardenas Plan, 380 F. Supp. at 692, 696, Appendix, at pp. 190a, 206a-07a,

the court adopted that program as a model (380 F. Supp. at 692, Appendix at p. 190a) and directed "that a prompt start should be made in a pilot program for implementation and utilization of the Cardenas plan, or something similar to it, in Denver" 380 F. Supp. at 696, Appendix at p. 206a. The court proposed to maintain the existing program at Del Pueblo, and to extend it on a pilot basis to one senior high school, one junior high school and two additional elementary schools. (380 F. Supp. at 692, 696, Appendix at pp. 190a, 206a.)[8/] In further stating the reasons for adopting this approach, it found:

> . . . that most of our Spanish surnamed or Mexican-American children are able to speak English and thus teaching in the Spanish language would not be necessary. Nevertheless, the Spanish language is a more natural one for a great many Spanish surnamed or

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8. Under the District Court's Final Judgment and Decree, the program was initially ordered extended to a third elementary school as well. Appendix at p. 107a.

> Mexican-American students. Thus extensive curriculum offerings in the Spanish language and in Spanish culture would be appropriate in the mentioned schools.

380 F. Supp. at 692, Appendix at p. 191a.

The District Court's Final Judgment and Decree, Appendix at pp. 92a-122a, ordered, inter alia, that:

> The defendants shall further develop a bilingual-bicultural educational program in accordance with the model presented by Dr. Jose Cardenas or a plan substantially and materially similar thereto and incorporating to the extent feasible the proposals set forth in the Addendum to the Cardenas Plan.

Appendix at p. 106a (emphasis added).

The Cross Appeals From the District Court's Actions on Remand

Cross appeals were taken from various components of the Final Judgment and Decree by the plaintiffs and the defendants. Basically, the plaintiffs con-

tended that the District Court's plan provided for insufficient integration in that it substituted, to an undue extent, part time integration for full time integration, and needlessly left five minority schools segregated; it needlessly placed a disproportionate burden of changed school assignments on minority children; and it was less effective than the plaintiffs' plans. The defendants challenged the District Court's findings that they were guilty of system-wide de jure segregation. They also challenged the court's plan basically on the grounds that the court unlawfully directed that specific degrees of racial balance be attained; that imposition of the Cardenas bilingual-bicultural plan was an unwarranted intrusion into matters of educational policy and curriculum; and that the court unlawfully ordered the defendants to adopt an affirmative action employment plan. Both the original plaintiffs and the Intervenors, CHE, opposed the defendants' assault on the District Court's plan as appellees.

Court of Appeals Review of the District Court's Final Orders on Remand

The Court of Appeals affirmed in part and reversed in part, and remanded the case for further proceedings. (Appendix at p. 2a.) The Court of Appeals affirmed the District Court's findings and conclusion that the defendants operated a system-wide de jure tri-ethnic segregated school system. (Appendix at pp. 18a-19a.) The Court of Appeals also sustained the District Court's use of Anglo-minority enrollment percentages as guidelines in shaping its remedy (Appendix at pp. 32a-33a), and its general reliance on Dr. Finger's pupil reassignment proposals (Appendix at pp. 43a to 45a). The Court of Appeals further ruled that the District Court's pupil reassignment plan did not impermissibly burden minority students (Appendix at pp. 44a-45a) and upheld its faculty and staff desegregation plan (Appendix at pp. 62a-65a).

The District Court was reversed in three areas. First the Court of Appeals held the part-time elementary school pairing components of the District Court's plan were constitutionally inadequate. (Appendix at pp. 37a-43a.) Second, the Court of Appeals ruled that the District Court improperly left five predominantly Chicano schools segregated under its guidelines. (Appendix at pp. 45a-48a.)[9/] Third, the Court of Appeals reversed the District Court's imposition of the

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9. The Court of Appeals concluded that "The [district] court justified the continued segregation of students in four of these schools--on grounds of the schools' inaccessibility and the institution or confirmation of bilingual-bicultural programs." (Appendix at p. 46a.) The Court of Appeals ruled that "bilingual education . . . is not a substitute for desegregation. Although bilingual instruction may be required to prevent the isolation of minority students in a predominantly Anglo school system [citations omitted], such instruction must be subordinate to a plan of school desegregation." (Appendix at p. 47a.) That portion of the case was remanded

Cardenas Plan. (Appendix 48a-60a.)[10/]

The Court of Appeals ruled that imposition of the Cardenas Plan could not be justified on the grounds (1) that it "is necessary to effectuate meaningful [de]segregation in the [defendants'] schools" (Appendix at p. 51a); (2) that it corrects the defendants' proven fail-

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(footnote cont.)
for a determination of whether the continued segregation of students at the contested schools could be justified on acceptable grounds.

The Intervenors have never taken the position that bilingual-bicultural education is a substitute for desegregation. Much to the contrary, they have always taken the position that the Cardenas Plan can and should be implemented within a fully integrated setting. (See, e.g., Tr. 1135-39.) Indeed, it has always been the Intervenors' position that both pupil placement and compensatory education components are necessary to achieve constitutionally sufficient conversion of a de jure segregated school system into a lawful unitary system.

10. On grounds similar to its rejection of the

ure to provide an equal educational opportunity, which "constitutes a separate violation of the Fourteenth Amendment . . ." (Appendix at p. 52a); or (3) that it corrects the defendants' separate violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and the regulations promulgated pursuant to it, "in failing to provide language instruction to substantial numbers of non-English speaking children enrolled in public schools" (Appendix at p. 58a).

Apparently limiting the factual predicates for the District Court's Final Decree to the record and findings subsequent to this Court's remand, and therefore precluding reliance on the earlier evidence and findings, the Court of Appeals held that the District Court's remedy "goes too far" (Appendix at p. 54a), in that it went beyond "the proven con-

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(footnote cont.)
Cardenas Plan, the Court of Appeals also reversed the District Court's order consolidating East and Manual High Schools. (Appendix at pp. 60a-62a.)

stitutional violation" of de jure segregation (Appendix at p. 53a), and unduly invaded local control which "permits citizen participation in the formulation of school policy and encourages innovation to meet particular local needs" (Appendix at p. 55a). Further, the Court of Appeals ruled plaintiffs and Intervenors had proved no denial of equal educational opportunity, amounting to a somewhat independent violation of the Fourteenth Amendment. (Appendix at p. 56a.) Finally, the Court of Appeals concluded that there is no "support [in the record] for a violation of section 601" of the Civil Rights Act of 1964 because in the 1973-74 school year, "school authorities identified 344 students in the system with language difficulties arising from their Spanish-speaking backgrounds", "determined that 251 of these students needed special help in acquiring language skills necessary to function satisfactorily in school," and operated "a number of programs . . . directed to the needs

of these students." (Appendix at p. 58a n. 22.)[11/]

Despite, and somewhat in contradiction to these conclusions, the Court of Appeals remanded "for a determination of the relief, if any, necessary to insure that Hispano and other minority children will have the opportunity to acquire proficiency in the English language." (Appendix at p. 59a.) In a separate concurring opinion, Judge Seth indicated that he would have remanded "for a complete reconsideration of the remedy." (Appendix at p. 83a.)

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11. The Court of Appeals completely ignored Intervenors' evidence, in the Record, that these programs do not reach the many Chicano children, estimated by CHE to number some 4,000 (MALDEF X-2), who could understand Spanish better than English, even though they might be able to speak English. Nor did the Court of Appeals consider the Intervenors' evidence that the existing programs were otherwise deficient. (E.g. Tr. 1001-10.)

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT QUESTIONS CONCERNING JUDICIAL REMEDY OF UNEQUAL EDUCATIONAL OPPORTUNITIES AND NATIONAL ORIGIN DISCRIMINATION SUFFERED BY CHICANO SCHOOL CHILDREN.

This lawsuit comes before the Court freighted with a significant history. In its previous opinion in this case, the Court relied upon findings of the United States Commission on Civil Rights and the District Court to conclude that Chicanos in the Southwest "suffer from the same educational inequities as Negroes and American Indians." 413 U.S. at 197. See, e.g., United States v. Texas Education Agency (Austin Independent School District), 467 F.2d 848, 852 (5th Cir. 1972). Furthermore, in that opinion the Court established the preliminary rules for determining when educational inequalities are unconstitutional with respect to Chicano students. Thus,

in its constitutional impact and its precedential significance, the Keyes decision was as important for Chicano students as this Court's decision in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (Brown I) was for black students. For Chicano people, and many other linguistic and national origin minority groups, the instant proceedings are analogous to Brown II [12], in that this Petition places before the Court important questions concerning the remedy to be imposed once a trial court finds that a school system unconstitutionally segregates and discriminates against Chicanos. This case presents the question of whether, in fashioning remedies for proven constitutional violations of the rights of Chicanos and other language minorities, school authorities and trial courts should take account of the differences, as well as the simi-

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12. Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).

larities in the educational inequalities that Chicanos, as opposed to blacks, suffer.

As the Fifth Circuit recently recognized, Chicanos constitute a constitutionally identifiable and separate national origin minority, and "[t]hey are as much entitled to the benefits of the Equal Protection Clause of the Fourteenth Amendment as blacks or whites." Hence, courts should "give effect to the legal consequences of the .. . . recognition of Mexican-Americans as a separate minority group." United States v. Texas Education Agency (Austin Independent School District), 467 F.2d 848, 852 (5th Cir. 1972).

The case for differential treatment is compelling in the instant lawsuit. For, as the District Court found, Chicanos and not blacks constitute the largest constitutionally identifiable minority in the Denver school system.

> The scope and magnitude of the problem is evidenced by the numbers and ethnic origins of students as of September 28, 1973. In the elementary schools there were 46,060 students, including 17.6% black, 27% Spanish-surnamed and 54.1% Anglo. The total enrollment in the junior high schools on the same date was 21,018, including 18.5% black, 24% Spanish-surnamed, and 56.6% white. The senior high schools totaled 20,542. The percentage of black students was 17.3%, that of Spanish-surnamed students was 17.8% and that of Anglo students was 63.8%.

380 F. Supp. at 674. If anything, the deprivations suffered by Chicanos within the Denver school system are even greater than those suffered by blacks.

This Court has begun to recognize the differences in the unequal educational opportunities suffered by language and national origin minorities as opposed to blacks. The Court has held, albeit in a statutory rather than a

constitutional context, that "there is no equality of treatment [of members of language minority groups] merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." Lau v. Nichols, 414 U.S. 563, 566 (1974). Accord: Serna v. Portales Municipal Schools, 499 F.2d 1147, 1153 (10th Cir. 1974).

Other governmental agencies have begun to recognize the critical relevance of these differences between unequal educational opportunity suffered by Chicanos (and other language and national origin-minorities) and unequal educational opportunity suffered by blacks. For example, in earlier proceedings, this Court relied upon reports of the United States Civil Rights Commission to find that Chicanos "suffer from the same educational inequalities as Negroes and American Indians." 413 U.S. at 197.

The two reports relied upon have now been augmented by four others, each showing that Chicanos also have unique problems of educational inequality that require different remedies.[13/]

An even more recent study has now been published by the Civil Rights Commission compellingly arguing that:

> Many language minority children are handicapped by poverty and discrimination before they even enter school, and although language is only one obstacle which they face in attempting to complete an education, it is a major one. Bilingual-bicultural education can remove much of the

13. U.S. Commission on Civil Rights, Mexican-American Education Study--Report I: Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest (1971); Report II: The Unfinished Education (1971); Report III: Educational Practices Affecting Mexican Americans in the Southwest (1972) ; Report IV: Mexican American Education In Texas: A Function of Wealth (1972); Report V: Differences in Teacher Interaction With Mexican American and Anglo Students (1973); Report VI: Toward Quality Education for Mexican Americans (1974)

> burden for those children and thus put completion of an education within their grasp.
>
> . . . Bilingual-bicultural education . . . can provide one of the best means for diminishing such [ethnic] separation. Without full economic and social opportunity, language minority groups will almost certainly remain isolated, outside the American mainstream.

U.S. Commission on Civil Rights, A Better Chance to Learn: Bilingual-Bicultural Education (Clearinghouse Publication No. 51, May 1975), p. 141.

The Department of Health, Education and Welfare Office of Civil Rights recently published new guidelines on bilingual-bicultural education entitled:"Task Force Fundings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols." Appendix at pp. 330a-61a. These guidelines constitute a definitive interpretation of Title VI of the Civil Rights Act of 1964. In the

guidelines, HEW has recognized the need for development of comprehensive plans which require extensive investigation and remedies by school boards. For example, the guidelines provide for language identification, diagnosis, program selection and election, teacher requirements, racial/ethnic identification of schools and classes, notification to parents and students, and evaluation.

The panel of the Tenth Circuit in the instant case appears to have understood that a school district's obligation under Title VI is limited to provision of programs that meet the English language training needs of linguistic minority group students who cannot function even minimally in English. By contrast, the new HEW regulations mandate development of a variety of bilingual-bicultural programs for a continuum of language and national origin-minority group students to be placed in one of the following categories by language:

A. Monolingual speaker of a language other than English;
B. Predominantly speaks a language other than English;
C. Bilingual (speaks both English and another language);
D. Predominantly speaks English;
E. Monolingual speaker of English.

Appendix at pp.333a-34a.

Furthermore, Congress has now specifically declared that "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs" (20 U.S.C. § 1703(f)(Supp.), Appendix at p.290a), constitutes a litigable denial of equal educational opportunity. See 20 U.S.C. § 1706 (Supp.).

The State of Colorado, too, has now recognized that its language and national origin minorities require special attention to assure them equal educational opportunity. In June of

1975, Colorado enacted a Bilingual and Bicultural Education Act, which mandates comprehensive Bilingual and Bicultural education programs for every school having 50 or more students, or at least having 10% of the student body, in grades kindergarten through third grade with linguistically different skills. Appendix at p. 383a.

The Tenth Circuit rejected the compensatory education components of the District Court's plan due to its misreading of this Court's directions. It believed that this Court directed that Chicanos and blacks be treated precisely alike, and that neither should be entitled to compensatory education, in the course of converting a segregated school system into a unitary one. The fundamental error of the Tenth Circuit is revealed in the separate concurring opinion of Judge Seth, who observed:

> If there is segregation there imposed by the Board,

> as the Supreme Court indicates there is, it must receive the same treatment as in the black schools . . . The Supreme Court in its opinion ordering remand has directed that these students and the black students be considered together, and for this reason it must be done.

Appendix at p. 82a.

This Court, however, never stated that Chicanos and blacks should be treated as though they were the same for purposes of converting a de jure tri-ethnic segregated school system "to a unitary system in which racial discrimination would be eliminated root and branch." Green v. School Board of New Kent County, 391 U.S. 430, 437 (1968). The Court ruled only "that the District Court erred in separating Negroes and Hispanos for purposes of defining a 'segregated' school." Keyes, supra, 413 U.S. at 197. Further, in its previous opinion in the instant case, this Court specifically reserved decision upon:

> . . . the merits of the holding of the District Court, premised upon its erroneous finding that

> the situation "is more like de facto segregation", 313 F. Supp. at 73, that nevertheless, although all-out desegregation "could not be decreed . . . the only feasible and constitutionally acceptable program . . . is a system of desegregation and integration which provides compensatory education in an integrated environment." Id. at 96.

413 U.S. at 214 n. 18. This Petition brings before the Court the questions it reserved in the earlier proceedings, as well as other important questions. Certainly in the interest of clarifying the law on this subject, the Petition for Writ of Certiorari should be granted.

II. THE DECISION OF THE COURT OF APPEALS LIMITING THE EQUITABLE POWER OF THE DISTRICT COURT TO ELIMINATE DE JURE RACIAL DISCRIMINATION "ROOT AND BRANCH" WITHIN DENVER'S PUBLIC SCHOOLS IS INCONSISTENT WITH PRIOR CONTROLLING DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER CIRCUIT COURTS.

A. The Decision of the Court of Appeals Conflicts With Controlling Decisions of This Court Recognizing Vast Discretion in the Equitable Powers of the Trial Courts to Fashion Such Remedies as are Necessary to Eliminate "Root and Branch" System-Wide De Jure Racial Discrimination in a Single School System.

This Court has frequently passed upon the validity of various methods to desegregate unconstitutional dual racial school systems, and to convert them into constitutionally valid unitary school systems, by eliminating, "root and branch", de jure racial discrimination. It has established as constitutional policy a heavy reliance

on trial courts, recognizing that they must be given great latitude in formulating remedies commensurate with local circumstances.

In Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (Brown I), the Court declared the fundamental principle that racial discrimination in public education is unconstitutional. In the second round of that litigation, Brown v. Board of Education of Topeka, 349 U.S. 294 (1955) (Brown II), the Court addressed the question of remedying proven racial segregation and discrimination:

> Full implementation of the constitutional principles may require solution of varied local school problems . . . Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.

349 U.S. at 299. Clearly it was

understood that trial courts, guided by equitable principles, would have to deal with various considerations to assure compliance with constitutional requirements. "To that end, the [trial] courts may consider problems related to administration . . . and revision of local laws and regulations which may be necessary in solving the foregoing problems." 349 U.S. at 300.

The Court cautioned that school authorities have the primary responsibility of dealing with desegregation problems. Brown II, supra, 349 U.S. at 299. Accord: Green v. School Board of New Kent County, 391 U.S. 430, 439 (1968); United States v. Montgomery County Board of Education, 395 U.S. 225, 267 (1969). Thus school boards have repeatedly been charged with the affirmative duty to take whatever steps might be necessary "to convert to a unitary system in which racial discrimination [not merely physical racial segregation]

would be eliminated root and branch." Green, supra, 391 U.S. at 437-38. However, the trial courts are charged to "consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." Brown II, supra, 349 U.S. at 299. Accord: United States v. Montgomery County Board of Education, supra, 395 U.S. at 227; Louisiana v. United States, 380 U.S. 145, 154 (1965).

The trial court's equitable powers are so extensive that it "may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to raise funds adequate to reopen, operate and maintain without racial discrimination, a public school system." Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 233 (1964). Also, in Wright v. Council of the City of Emporia, 407 U.S. 451 (1972), the district court was allowed, under its

equitable remedial power, to prevent the establishment of a new school district, where it appeared that the primary purpose for its creation was to retain separation of the races.

Clearly, then, this Court generally prefers to defer to the district court's discretion in formulating a remedy, once unlawful discrimination has been established, unless the plan a trial court adopts "fails to provide meaningful assurance of prompt and effective disestablishment of a dual system." Green, supra, 391 U.S. at 438. Furthermore, the Courts of Appeals have been instructed not to interfere with such district court actions. See, e.g., United States v. Montgomery County Board of Education, supra, 395 U.S. 225.

Definitive standards for the exercise of the district court's discretion were articulated in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971):

> Once a right and a violation have been shown, the scope of the district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

402 U.S. at 15.

Since the school board in Swann totally failed to come forward with an acceptable plan of its own, the district court properly turned to other qualified sources. This Court approved, stating that "the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular circumstances." Swann, supra, 402 U.S. at 25. Thus, the Court sanctioned the trial court's use of outside experts to fashion a plan of its own, and to make extensive use of various tools to implement its plan.

The only apparent limitation on the trial court in providing equitable relief through the use of remedial techniques concerns questions of whether implementation was "within the capacity of the school authority,

Swann, supra, 402 U.S. at 26, or could feasibly be implemented, since "[n]o per se rule can adequately embrace all the difficulties of reconciling the competing interest involved." Swann, supra, 402 U.S. at 26. The decree did not preclude more extensive remedies which may be reasonable, feasible, workable, effective, and realistic. Swann, supra, 402 U.S. at 31. Accord: Davis v. School Commissioners of Mobile County, 402 U.S. 33, 37 (1971).

This Court has expressly limited a trial court's equitable power to implement a comprehensive desegregation plan in only one case, and then by a vote of five to four. Milliken v. Bradley, 418 U.S. 717 (1974). In ruling that the District Court had overreached its power in Milliken, the Court built upon its decision in Swann, supra, where it had observed that "In seeking to define even in broad and general terms how far this remedial power extends it

is important to remember that judicial powers may be exercised only on the basis of a constitutional violation." 402 U.S. at 16. Hence, in a school desegregation case, just "as with any equity case, the nature of the violation determines the scope of the remedy." 402 U.S. at 16.

In Milliken, only the City of Detroit's school system was found to have violated the Fourteenth Amendment. Yet the trial court had ordered an inter-district pupil placement remedy, which would have imposed part of the burden of remedying Detroit's constitutional violation on separate and governmentally unrelated suburban school districts which had not been shown to have violated the Constitution. The Court ruled that, "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." Milliken, supra, 418 U.S. at 745.

Notably, distinguishing the situ-

ation in Detroit from that of Denver in the instant case, the Court stated that Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973) ". . . involved a remedial order within a single autonomous school district." Milliken, supra, 418 U.S. at 741 n. 19.

Indeed, the question addressed by the Court was limited, in Milliken, to determining "the circumstances in which a federal court may order desegregation relief that embraces more than a single school district." 418 U.S. at 741. Thus the decision does not limit the equitable power of a district court to fashion a comprehensive remedial plan to eliminate "root and branch" racial segregation and discrimination within a single school system proven guilty of system-wide discrimination.

Further, it was apparent in Milliken that this Court concluded that the trial court's interdistrict remedy unjustifiably restructured and consolidated "54 independent school districts [i.e., local governmental units]

historically administered as separate units into a vast new super school district." 418 U.S. at 743. Yet the trial court had not even addressed the serious governmental questions that would be presented by this consolidation. 418 U.S. at 743. None of these considerations is present in the instant case.

Thus, in all desegregation cases, the Court has emphasized the fact that circumstances support use of vast equitable discretion by the trial court. However, the Court has not yet determined the validity of any plan designed to dismantle a tri-ethnic segregation and discrimination situation. Review of the instant case will provide the Court with an important opportunity to clarify the extent to which a district court, having found system-wide and de jure tri-ethnic discrimination and segregation, may act to assure the "root and branch" elimination of the discrimination and conversion of the school system into a

unitary one in which equal educational opportunity is provided to all students. Green, supra, 391 U.S. at 437-38.

B. The Decision of the Court of Appeals Conflicts With Decisions of Other Circuits, Especially With Those of the United States Court of Appeals for the Fifth Circuit, Mandating Detailed and Comprehensive Tri-Ethnic School Desegregation Plans, Including Plans Which Provide for Bilingual-Bicultural and Other Compensatory Programs.

Unlike the Tenth Circuit, other Circuit Courts generally have mandated experimentation and implementation of comprehensive and detailed desegregation plans in bi-racial and tri-ethnic public school discrimination contexts. See, e.g., Morgan v. Hennigan, 379 F. Supp. 410, 482 (D. Mass. 1974), aff'd sub nom. Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1975); Brewer v. School Board of City of Norfolk,

Virginia, 397 F.2d 37, 41 (4th Cir. 1968); Davis v. School District of Pontiac, Inc., 474 F.2d 46, 47 (6th Cir. 1973); United States v. Board of School Commissioners of Indianapolis, Inc., 474 F.2d 81, 85 (7th Cir.), cert. denied, 413 U.S. 920 (1973).

In particular, the Tenth Circuit decision in the instant case conflicts with numerous decisions of the Fifth Circuit. This conflict is especially significant in that the Fifth Circuit has dealt with desegregation matters to a greater extent than have the other circuit courts. Probably because Chicanos constitute the largest constitutionally identifiable ethnic minority in the State of Texas, the Fifth Circuit has also led the other circuit courts in treating discrimination against Chicanos and tri-ethnic public school segregation and discrimination. E.g., see Keyes v. School District No. 1, Denver, 413 U.S. 189, 197 (1973), where this Court relied

on several cases from Texas for its ruling "that Hispanos constitute an identifiable class for the purposes of the Fourteenth Amendment."14/

The Fifth Circuit has generously described the spectrum of remedies to be considered by trial courts in desegregation cases. In United States v. Jefferson County Board of Education, 380 F.2d 385, 389 (5th Cir. 1967) (en banc), cert. denied, 389 U.S. 840 (1967), the court held that:

> If Negroes are ever to enter the mainstream of American life, as school children they must have equal educational opportunities with white children.

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14. The most recent Fifth Circuit decisions treating public school discrimination against Chicanos include: Zamora v. New Braunfels Independent School District, __F.2d.__(5th Cir. September 5, 1975) (No. 73-2999); United States v. Midland Independent School District, __F.2d__ (5th Cir. August 28, 1975) (No. 71-3271); Morales v. Shannon, 516 F.2d 411 (5th Cir. 1975); Tasby v. Estes, 517 F.2d 92 (5th Cir. 1975); Arvizu v. Waco Independent School District, 373 F. Supp. 1264 (W.D. Tex. 1973), aff'd in part, rev'd as to other issues, 495 F.2d 499 (5th Cir. 1974).

> . . . The necessity of overcoming the effects of the fual school system in this circuit requires integration of faculties, facilities and activities, as well as students.

Jefferson County, supra, 380 F.2d at 390. In the Jefferson County case, the Fifth Circuit formulated extensive instructions to its district courts, for use in adopting future desegregation plans. The instructions dealt with many facets of school administration and education, including, for example, provision for equalization of facilities and programs and implementation of remedial education programs.

In another notable case the Fifth Circuit sustained a district court decision requiring the Texas Education Agency and the State Commissioner of Education to fulfill "their affirmative obligations under Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment to the Constitution", "relating to the desegregation of public

elementary and secondary education within the State of Texas . . ." United States v. Texas, 447 F.2d 441, 442-43 (5th Cir. 1971), cert. denied, 404 U.S. 1016 (1972). The District Court has concluded that the state's duty was two-fold: "First, to act at once to eliminate by positive means all vestiges of the dual school structure throughout the state, and second, to compensate for the abiding scars of past discrimination." 447 F.2d at 443. The District Court's plan imposed substantial remedial obligations on the state officials, including many dealing with "curriculum and compensatory education." 447 F.2d at 448. With modifications not relevant to the issues in the instant case, the Fifth Circuit upheld the District Court's findings and plan. 447 F.2d at 441-42.

In subsequent proceedings in United States v. Texas, the relationship between a Chicano-Anglo pupil placement order and a bilingual-bicultural order was most extensively expli-

cated by the District Court and affirmed by the Fifth Circuit. United States v. Texas, 342 F. Supp. 24 (E.D. Tex. 1971), aff'd, 466 F.2d 518 (5th Cir. 1972). Although desegregation suits involving black and white students may provide guidelines in a similar case involving Chicano students, the District Court noted that the special circumstances of the Chicano students must be considered in providing remedies to their particular problem. the Court stated:

> Little could be more clear to the Court than the need for special educational consideration to be given to Mexican Americans in assisting them in adjusting to those parts of their new school environment which present a cultural and linguistic shock.

342 F. Supp. at 28.

Finding that the San Felipe del Rio Consolidated Independent School District constituted an illegally segregated school system, the District Court ordered the implementation of a

comprehensive education plan which included not only a pupil placement component but also an extensive bilingual-bicultural instructional program and other compensatory education components. 342 F. Supp. at 28-38. The plan imposed by the District Court was strikingly similar to the plan imposed by the trial court in the instant case. This similarity is not remarkable, for the San Felipe del Rio Plan, like the Intervenors' Plan in the instant case, was formulated by Dr. Jose Cardenas. See 342 F. Supp. at 28. The Fifth Circuit, however, unlike the Tenth Circuit, affirmed the District Court's implementation of the Cardenas Plan. 466 F.2d 518 (5th Cir. 1972).

Numerous other panels and District Courts in the Fifth Circuit have ordered the implementation of bilingual-bicultural education and other remedial or compensatory programs as a part and parcel of a desegregation case involving Chicano

students.[15] In United States v. Texas (Austin Independent School District), Civ. No. A-70-CA-80 (W.D. Tex. Aug. 1, 1973), pending on appeal (5th Cir. No. 73-3301), the trial court included in its plan a directive that Mexican American students be provided "a curriculum and special educational programs such as bilingual-bicultural education."

Similarly, in Arvizu v. Waco Independent School District, 373 F. Supp. 1264 (W.D. Tex. 1973), aff'd in part, rev'd as to other issues, 495 F.2d 499 (5th Cir. 1974), the court ordered the implementation of a plan that provided for a "sophisticated" bilingual-bicultural education program, 373 F. Supp. at 1280, designed to

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15. In its recent "Memorandum of Decision and Remedial Orders", in the Boston School Case, the United States District Court for the District of Massachusetts also stressed bilingual and compensatory education, especially "for Hispanic students and for others in need of this service." Morgan v. Kerrigan, __F. Supp. __(D. Mass. June 5, 1975) (Civ. No. 72-911-G), Slip Opinion at pp. 40-43, 65-67, 81-87, on appeal (1st Cir. Nos. 75-1184, 75-1195, 75-1197, 95-1212) (argued Sept. 12, 1975).

provide a scholastic environment receptive to Chicano students.

In Morales v. Shannon, 516 F.2d 411, 414-15 (5th Cir. 1975), rev'ing in part aff'ming in part, 366 F. Supp. 813 (W.D. Tex. 1973), a panel of the Fifth Circuit reversed a district court determination that there was no de jure segregation of Chicanos in the Uvalde, Texas school system. The panel also observed that since the lawsuit was filed, the State of Texas had by statute mandated bilingual-bicultural programs and the defendants had instituted such a program. The panel also concluded that, "It is now an unlawful educational practice to fail to take appropriate action to overcome language barriers." 516 F.2d at 415. Despite the panel's belief that the "entire question goes to a matter reserved to educators" (516 F.2d at 415), the case was also remanded for trial court examination of the program to determine whether it comported with legal requirements.[16/]

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16. Not only has this Court (Lau v. Nichols,

(footnote continued on next page)

This Court should grant the Writ of Certiorari to resolve the direct conflict between the Tenth and Fifth Circuits regarding the inclusion of bilingual-bicultural and compensatory education components in court-ordered deseg-

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16. (continued from preceeding page) 414.U.S. 563 (1974)) and the Fifth Circuit recognized that "it is an unlawful educational practice to fail to take appropriate action to overcome language barriers", but so has a panel of the Tenth Circuit. Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974). Relying on evidence of unequal educational opportunity similar to that which has been adduced on the record of the instant case, the court sustained a District Court decision that the plaintiffs had proved that they were the victims of unlawful educational practices. Specifically, the defendants were found to have "failed to institute a program which will rectify language deficiencies so that these [Spanish-surnamed children] will receive a meaningful education." 499 F.2d at 1154. In Serna, the district court had found the school system guilty of unlawful national origin discrimination but not classical segregation, both under

(continued next page)

regation plans, as well as the general conflict between the Tenth Circuit and the other Circuits regarding the district courts' equitable discretion to formulate comprehensive and workable plans to convert unlawfully segregated systems into "unitary system[s] in which racial discrimination would be eliminated root and branch", Green v. School Board of New Kent County, 391 U.S. 430, 437 (1968).

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16. (continued from preceeding page) the Fourteenth Amendment as well as Title VI of the Civil Rights Act of 1964. 499 F.2d at 1153. The Court of Appeals sustained the District Court only under Title VI and did not reach the Fourteenth Amendment question. In upholding the district court's bilingual-bicultural education plan, however, the Court of Appeals specifically employed standards for review of district court equitable powers formulated in desegregation cases. 499 F.2d at 1154.

III. DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH THIS COURT'S DECISIONS AND CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS IN THAT THE COURT OF APPEALS FAILED TO GIVE APPROPRIATE DEFERENCE TO GUIDELINES OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE FOR IMPLEMENTING A DESEGREGATION REMEDY.

Numerous decisions of this Court have recognized that the guidelines imposed by the Department of Health, Education and Welfare for compliance with Title VI of the Civil Rights Act of 1964,[17/] are the bare minimum standards to be imposed by courts when they

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17. Title VI prohibits exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on grounds of race, color, or national origin. § 2000d. It also authorizes HEW to effectuate these provisions. § 2000d-1. The Commissioner of Education is under a duty to withold funding from any educational agency for non-compliance with the act. § 2000d-5.

order public school desegregation under the Fourteenth Amendment. See, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971); Green v. County School Board, 391 U.S. 430, 433 (1968). See also, Lau v. Nichols, 414 U.S. 563 (1974).

Similarly, the Fifth Circuit has placed great emphasis on HEW standards. For example, in Singleton v. Jackson, 348 F.2d 729, 731 (5th Cir. 1965), that court stated:

> There should be close correlation . . . between the judiciary's standards in enforcing the national policy requiring desegregation of schools and the executive department's standards in administering the policy.

For several reasons, the Fifth Circuit correctly believes that HEW guidelines should be used as the minimum standards to be imposed by courts in desegregation cases: (1) to promote uniform policy of desegregation; (2) to prevent

school boards from circumventing HEW requirements and; (3) to avoid the possibility that courts will handle cases on an ad hoc basis. Singleton, supra, 348 F.2d at 731. See also, e.g., United States v. Texas Education Agency, 467 F.2d 848, 860 (5th Cir. 1972); United States v. Texas, 447 F.2d 441, 446 (5th Cir. 1971), cert. denied, 404 U.S. 1016 (1972); United States v. Jefferson County Board of Education, 380 F.2d 385, 390 (5th Cir. 1967) (en banc), cert. denied, 389 U.S. 840 (1967); United States v. Jefferson County Board of Education, 372 F.2d 836, 886 (5th Cir. 1966).

Lau v. Nichols, 414 U.S. 563 (1974) involved the San Francisco School District, which had been found guilty, in earlier proceedings, of racial discrimination and had had a system-wide desegregation plan imposed on it.[18] In Lau

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18. Johnson vs. San Francisco, 339 F. Supp. 1315 (N.D.Ca.) petition for stay denied sub nom. Guey Hueng v. Johnson, 404 U.S. 1215 (1971), remanded, 500 F.2d 349 (9th Cir. 1974).

the Court addressed the plight of the large number of San Francisco students of Chinese ancestry who are non-English speaking and were receiving no instruction designed to rectify their inability to function in English. This Court concluded that the defendants were under an affirmative legal requirement to provide programs addressed to these students' language disabilities.[19/]

The Lau decision was based upon Title VI of the Civil Rights Act of 1964, rather than on constitutional grounds; however, the Lau case serves to emphasize the fact that trial courts should consider the needs of linguistic and national origin-minorities in implementing a desegregation remedy. Moreover, in Lau, this Court expressly relied upon and validated the 1970 HEW regulations, which were promulgated

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19. In Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974), a panel of the Tenth Circuit, following this Court's lead, sustained under Title VI a court-ordered bilingual-bicultural education plan designed to redress the unequal educational opportunities suffered by Mexican-American children.

under Title VI. 414 U.S. at 566-69; id., 414 U.S. at 571 (Steward, J., Burger, C.J., and Blackmun, J., concurring). These regulations were designed to impose an affirmative obligation on school districts receiving federal funds to operate programs to rectify language deficiencies of linguistic minority group members. 35 Fed. Reg. 11595, Appendix at pp. 319a-23a. See also, § 204(f) of the Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1703(f)(Supp.), Appendix at pp. 288a-90a, which now makes it an unlawful educational practice to fail "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

During the past summer, HEW promulgated extensive new regulations, entitled "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols" (Appendix at

pp. 330a-61a), and transmitted these regulations to the chief school officer of each of the States (Appendix at pp. 324a-30a). These regulations, which are quite consistent with the plan ordered by the District Court in the instant case, [20] require the offering of bilingual-bicultural education to linguistic and national origin minority group students through a variety of comprehensive programs designed to meet the needs of students of varying English language ability.

The District Court's plan in the instant case is not only fully consistent with the controlling HEW regulations, the plan is also consistent with HEW's actions in conducting Title VI school desegregation compliance reviews. HEW compliance reviews are not limited to pupil placement and allied matters: they deal with a broad spectrum of responsibilities imposed on school officials

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20. Dr. Jose A. Cardenas, upon whose plan the District Court relied in the instant case to formulate its plan, was a member of the HEW Task Force which produces the new regulations.

to eliminate discrimination based on language and cultural differences. These obligations range from requiring the School District to meet the language needs of its students, to providing notice of meetings to parents in a language they can understand. Further, the HEW compliance plans now require affirmative action hiring, in-service training of teachers, counselors and administrators, curriculum modifications and employment of bilingual personnel. See generally, U.S. Commission on Civil Rights, Report VI: Toward Quality Education for Mexican Americans at 135 (1974).[21]

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21. For an account of the HEW compliance plan for the Socorro School District in Texas, see Report VI, supra, at pp.166-67. For accounts of the comprehensive plans imposed by HEW in places such as El Paso and Beeville, Texas, after employing Dr. Cardenas as an expert, see Tr. 1063.

In the Matter of Board of Education of Uvalde Independent School District, Administrative Proceeding, Department of Health, Education and Welfare (Docket No. S-47, July 24, 1974) (Final Decision of Reviewing Authority), the Office for Civil Rights held an extensive administrative hearing concerning segregation of Chicano students and a school district's failure to provide an equal educational opportunity program. The respondents there, as the defendants in the instant case, argued that they had no duty to provide bilingual education because there was no evidence that the absence of bilingual education was the result of de jure segregation. The reviewing authority of the Office for Civil Rights held that the absence of bilingual-bicultural education constitutes unlawful discrimination against Mexican American students. See, Morales v. Shannon, 516 F.2d 411, 415 n.1 (5th Cir. 1975). In parallel judicial proceedings, the Fifth Circuit has remanded the case to

the trial court to determine if, presumably in the light of HEW standards, the "defendants are engaging in discriminatory practices in the [bilingual-bicultural] program as it currently exists." 516 F.2d at 415.[22/]

This Court should grant the writ of certiorari in the instant case to further clarify the deference courts are to accord to HEW guidelines when courts desegregate public school systems which include substantial language and national origin minority group students.

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22. Dr. Cardenas was called as an expert witness in the Uvalde, Texas case, both in the HEW proceedings and in the court proceedings. (See Tr. 1024.)

IV. THIS CASE RAISES IMPORTANT QUESTIONS OF WHETHER THE DEFENDANTS' SYSTEMATIC FAILURE TO RESPOND TO THE EDUCATIONAL NEEDS OF CHICANO PUBLIC SCHOOL STUDENTS DENIED THEM EQUAL EDUCATIONAL OPPORTUNITY UNDER THE FOURTEENTH AMENDMENT AND TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, WHICH HAVE NOT BEEN, BUT OUGHT TO BE, RESOLVED BY THIS COURT.

At least, when a state, like Colorado (See, e.g., CRS 123-21-3, quoted in 380 F. Supp. at 696 n. 3, Appendix at p. 205a n. 3) makes it the central mission of its public schools to insure that all students achieve a master of English, under Title VI of the Civil Rights Act of 1964, school authorities have the affirmative duty to rectify any English language deficiency "[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district." 35 Fed. Reg. 11595 (1970). See Lau v. Nichols, 414 U.S. 563 (1974); Serna v.

Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974). As this Court has recognized:

> Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.

414 U.S. at 566. Further, HEW's latest regulations implementing Title VI, in this context, clearly impose obligations to treat affirmatively English language disabilities, even when the national origin-minority group children involved are able to speak and understand the English language, although not as well as their Anglo school mates. (Appendix at pp. 319a-23a.)

In 1962 an official Denver Special Study Committee on Equality of Education Opportunity found there was inequality in the educational opportunity offered

to racial minorities in the Denver schools. 303 F. Supp. at 283. Although the School Board then adopted various policy resolutions designed to implement changes recommended by the Special Study Committee, the resolutions were ultimately rescinded. See 303 F. Supp. at 284, 285. Thereafter, no substantial affirmative action was taken by the defendants to alleviate the problems of national origin minorities in the Denver area. 303 F. Supp. at 284-286. On the basis of these actions and the rest of the record in this case,[23/] but without specifically holding that the school board had violated Title VI, the trial court twice found all the elements of a Title VI violation, and concluded that the minority students were unlawfully denied the opportunity to participate equally with Anglo students in the Denver school system's educational programs. As the District Court found: "The educational

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23. The evidence bearing upon these issues is summarized in the Statement of the Case, supra, at pp.13-17, 20, 25-42.

opportunity in the minority schools has been proven in our present trial as well as in previous trials to be inferior to that in the majority schools." 380 F. Supp. 673, 682 (1974). Compare the language employed by this Court in finding the Title VI violation in Lau v. Nichols, supra, 414 U.S. at 566, 568.

Evidently, not even the Colorado legislature believes that existing programs are satisfactory to provide equal educational opportunities for language and national origin-minority students. During the pendency of the appeal in the instant case, the Colorado legislature enacted the comprehensive 1975 "Bilingual and Bicultural Education Act" to provide for the sort of education which would assure to these children an equal educational opportunity. Appendix at pp. 362a - 416a.

Thus, under the state-imposed standards for education within Colorado,

and this Court's decision in Lau, there was an ample basis in the record of the instant case for finding a violation of Title VI. Furthermore, in view of the new Colorado "Bilingual and Bicultural Education Act" and the new comprehensive HEW guidelines implementing Title VI in the instant kind of a case (Appendix at pp. 330a-61a), the District Court's decree does not overstep the scope of a proper remedy.

There is also a sufficient basis on the record for the District Court's findings that the defendants' failure to provide programs designed to afford the minority group children in Denver an equal educational opportunity constitutes a violation of the Fourteenth Amendment, somewhat independent of the proven de jure segregation. See, e.g., 313 F. Supp. 61, 73 (1970), issue reserved, 413 U.S. 189, 214 (1974).

Since this Court did not consider the relationship between Title VI and the Fourteenth Amendment in Lau, the

Court should now clarify the relationship, particularly in light of this Court's decision in Katzenbach v. Morgan, 384 U.S. 641 (1966). In that case, the Court stated, "We emphasize that Congress' power under §5 [of the Fourteenth Amendment] is limited to adopting measures to enforce the guarantees of the Amendment; §5 grants Congress no power to restrict, abrogate or dilute these guarantees." 384 U.S. at 651 n. 10. It is clear under this rationale that while Congress may expand constitutional guarantees under the Fourteenth Amendment, it may not contract them. It follows that in adopting Title VI, and in authorizing HEW to promulgate guidelines to effectuate it, Congress was properly expressly on the constitutional guarantees of the Fourteenth Amendment. This being the case, HEW guidelines should be considered the minimum constitutional standards to be applied in Fourteenth Amendment cases, and particularly in the instant case.

Further, in recently enacting the Equal Educational Opportunity Act of 1974, 88 Stat. 514, 20 U.S.C. §§1701 et seq. (Supp.) (See Appendix, at pp. 284a-91a), Congress specifically expressed its policy to further enforce Fourteenth Amendment equal protection guarantees. The Act in part states,

> § 1702(a). The Congress finds that
>
> > (1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment. . .
>
> § 1703. No State shall deny equal educational opportunity to an individual on account of his race, color, sex, or national origin by . . .
>
> > (f) the failure of an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in instructional programs.

Given this Court's holding in Katzenbach v. Morgan and the clear congressional intent to enforce constitutional guarantees through enactment of Title VI and the Equal Educational Opportunity Act of 1974, the Court of Appeals' decision raises serious constitutional questions.

Under the Fourteenth Amendment, the Denver school system must provide educational programs responsive to the needs not only of Anglos or blacks but also of Chicano children. Identical treatment of patently different groups may well not produce the "equality" mandated by our Constitution. See, e.g., Williams v. Rhodes, 393 U.S. 23 (1969). In Lau, supra, 414 U.S. at 568, this Court recognized that providing equal programs and facilities does not provide equality "where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program. . . ." The Court should now

consider whether the instant case may well present a situation in which equal treatment of two different constitutionally identifiable minority groups may deprive one group of equal protection under the Fourteenth Amendment. Previously, this Court has rejected the argument that provision of similar curricula and facilities was sufficient to satisfy the Equal Protection Clause, since the Court did not consider these the sole measures of equal educational opportunity. McLaurin v. Oklahoma State Regents 339 U.S. 637 (1950).

Certainly, the District Court's decision is in keeping with the policy established by this Court. The District Court based its decision on substantial evidence of the racial and national-origin composition of the student population of Denver, and various ethnic factors in the areas such as curriculum, instruction and guidance, administration and organization, and school-community relations. The District Court also

repeatedly found that the administration was aware of these conditions, but that they failed to take steps to rectify them. E.g., 303 F. Supp. 279, 284 (1969); 303 F. Supp. 289, 295 (1969); 313 F. Supp. 61, 65 (1970). On the Record of this case the Court should consider the Fourteenth Amendment and Title VI issues presented, and the Court should consider the interrelationship between the Fourteenth Amendment and Title VI.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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